EMERGENCY MOTION

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UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

—ooOoo—

In Re:

NEW CAL-NEVA LODGE, LLC,

Debtor.

_____/

PAUL AND EVY PAYE, LLC, a California limited liability company,

Appellant.

v.

LAWERENCE INVESTMENTS, LLC; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS; NEW CAL NEVA LODGE, LLC; CR LAKE TAHOE, LLC; 9898 LAKE, LLC,

Appellees.

_____/

Case No. BK-N-16-51282-GWZ
Chapter 11

Appeal Reference No. 17-50

BAP No. NV-17-1307

EMERGENCY MOTION FOR STAY PENDING APPEAL

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EMERGENCY MOTION FOR STAY PENDING APPEAL

Paul and Evy Paye, LLC, a California limited liability company ("Paye") by and through its counsel, Holly E. Estes, Esq., of ESTES LAW, hereby moves this Court for an emergency order staying enforcement of the Findings of Fact and Conclusions of Law in Support of Order Confirming First Amended Plan of Liquidation For New Cal-Neva Lodge, LLC Jointly Proposed By Lawrence Investments, LLC And The Official Committee of Unsecured Creditors Dated August 16, 2017 [DE 965] (the "Findings of Fact and Conclusions of Law ") entered on October 16, 2017, the Order Confirming First Amended Plan of Liquidation For New Cal-Neva Lodge, LLC, Jointly Proposed By Lawrence Investments, LLC And The Official Committee of Unsecured Creditors Dated August 16, 2017 [DE 966] entered on October 16, 2017, as amended by the Order Conditionally Granting Motion To Approve Non-Material Plan Modification [DE 967] entered on October 16, 2017 (together the "Order") during the pendency of the appeal from the Order. This Motion is made pursuant to Rules 7062, 8007 and 9014(c) of the Federal Rules of Bankruptcy Procedure, Federal Rule of Appellate Procedure 8(a), and is based upon the points and authorities set forth below, the pleadings and papers on file in this case, of which judicial notice is respectfully requested pursuant to Federal Rule of Evidence 201, and such other matters and argument as may be presented at the hearing hereon. The seven (7) day stay of the Order Confirming First Amended Plan of Liquidation For New Cal-Neva Lodge, LLC, Jointly Proposed By Lawrence Investments, LLC And The Official Committee of Unsecured Creditors Dated August 16, 2017 [DE 966] was set to expire on October 23, 2017, but the bankruptcy court granted an additional two day stay of that order in order for the Appellant to seek a stay from the appellate court. The stay of that order is now set to expire on October 25, 2017 at 5:00 p.m.

MEMORANDUM OF POINTS AND AUTHORITIES

A. RELEVANT FACTS

1. The debtor in the above captioned bankruptcy case is New Cal-Neva Lodge,

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LLC, a Nevada limited liability company (the "Debtor"). The Debtor filed its Chapter 11 petition on July 28, 2016 [DE 1].

2. The sole member of the Debtor is Cal-Neva Lodge, LLC, a Nevada limited liability company ("Cal Neva"). *See* First Amended Plan of Liquidation For New Cal Neva Lodge, LLC Jointly Proposed by Lawrence Investments, LLC, and the Official Committee of Unsecured Creditors Dated August 16, 2017 [DE 803], pg. 1. Cal Neva has also filed a petition for bankruptcy relief and has a case currently pending as Case No. 16-51281 in the United States Bankruptcy Court District of Nevada. *Id.*

3. A motion for substantive consolidation was filed with regard to the two debtor entities (Debtor and Cal Neva)[DE 842], but was denied by the Order Denying Cal Neva Lodge, LLC's Motion for Order of Substantive Consolidation [DE 918] entered on September 18, 2017.

4. On August 21, 2017, the Official Committee of Unsecured Creditors and Lawrence Investments, LLC (hereinafter the "Plan Proponents"), filed their jointly proposed First Amended Plan of Liquidation for New Cal Neva Lodge, LLC, Dated August 16, 2017 [DE 803], and their Addendum to First Amended Plan of Liquidation for New Cal Neva Lodge, LLC Jointly Proposed By Lawrence Investments, LLC and the Official Committee of Unsecured Creditors Dated August 16, 2017 [DE 806] (together the "Plan").

5. The Plan, Jointly Proposed By Lawrence Investments, LLC ("Lawrence") and the Official Committee of Unsecured Creditors ("OCUC") mentions two other non-debtor entities: CR Lake Tahoe, LLC, a Delaware limited liability company ("CR Tahoe") and 9898 Lake, LLC, a California limited liability company ("9898 Lake"). The Plan also mentions a real property asset of 9898 Lake, the Fairwinds Estate, which is not property of the Debtor's bankruptcy case estate. The Plan sought to sell the Debtor's real property the Cal Neva Resort, Spa & Casino, located at 2 Stateline Road, Crystal Bay, Nevada, and 9898 Lake's real property, the Fairwinds Estate, free and clear of all liens claims and interests to Lawrence or its assignee. *See generally* the Plan.

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6. The Debtor is the sole member of its non-debtor subsidiary CR Tahoe, and CR Tahoe is the alleged sole member of 9898 Lake. Plan, pg. 6 and pg. 11.

7. 9898 Lake, the non-debtor subsidiary of the non-debtor subsidiary of the Debtor, is the owner of the real property and improvements located at 9898 Lake Street, Kings Beach, California (the "Fairwinds Estate"). Plan, pg. 6.

8. On September 11, 2017, Paul and Evy Paye, LLC (hereinafter "Paye") filed its Objection to First Amended Plan of Liquidation for New Cal Neva Lodge, LLC Jointly Proposed By Lawrence Investments, LLC and the Official Committee of Unsecured Creditors Dated August 16, 2017 [DE 883] (the "Plan Objection").

9. On September 12, 2017, Paye filed the Declaration of John Paye in Support of Objection to First Amended Plan of Liquidation for New Cal Neva Lodge, LLC Jointly Proposed By Lawrence Investments, LLC and the Official Committee of Unsecured Creditors Dated August 16, 2017 [DE 891] (the "Declaration in Support of Plan Objection").

10. In its Plan Objection and Declaration in Support of Plan Objection Paye asserted that it had claims against CR Tahoe, 9898 Lake and the Fairwinds Estate pursuant to an Exchange Agreement dated October 26, 2014, executed by Paye, 9898 Lake, LLC, CR Lake Tahoe, LLC, and Cal Neva Lodge, LLC, but **not** the Debtor, New Cal Neva Lodge, LLC.

11. On September 26, 2017, Capital One, N.A., caused its trustee under its first priority deed of trust to record a Notice of Default with the Placer County Recorders Office against the Fairwinds Estate.

12. On September 26, 2017, the Plan Proponents filed their Motion to Approve Non-Material Plan Modification [DE 924] ("Motion to Modify"). In their Motion to Modify, the Plan Proponents sought a material modification to the Plan to include a wholesale exculpation of previously undisclosed parties under the guise that it was to effectuate their Plan, when really, they were seeking to exonerate the Debtor's principals for executing the fraudulent transfer of the Fairwinds Estate. Again, the Fairwinds Estate

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is not property of the bankruptcy case estate, and the owner of the Fairwinds Estate is not the Debtor.

13. On October 1, 2017, Paye filed its Objection to the Motion to Approve Non-Material Plan Modification [DE 948], and on October 3, 2017, Paye filed the Declaration of John Paye in Support of its Objection to the Motion to Approve Non-Material Plan Modification [DE 953].

14. On October 6, 2017, Paye commenced an adversary proceeding in the Cal Neva Lodge, LLC, bankruptcy case against the parties to the Exchange Agreement to enforce its rights. That case is pending in the United States Bankruptcy Court District of Nevada as case number 17-05040.

15. On October 6, 2017, Paye filed a notice of the pending adversary proceeding in the above captioned bankruptcy case to give notice of the pending action [DE 957].

16. On October 16, 2017, the Court entered its Order Confirming First Amended Plan of Liquidation For New Cal-Neva Lodge, LLC Jointly Proposed By Lawrence Investments, LLC And The Official Committee of Unsecured Creditors Dated August 16, 2017 [DE 966]; Findings of Fact and Conclusions of Law in Support of Order Confirming First Amended Plan of Liquidation For New Cal-Neva Lodge, LLC Jointly Proposed By Lawrence Investments, LLC And The Official Committee of Unsecured Creditors Dated August 16, 2017 [DE 965]; and its Order Conditionally Granting Motion To Approve Non-Material Plan Modification [DE 967] entered on October 16, 2017.

17. On October 18, 2017, Paye filed its Notice of Appeal [DE 971].

At the plan confirmation hearing the Court did not determine Paye's rights arising from the Exchange Agreement nor did it make a determination as to Paye's potential claims against Cal Neva, CR Tahoe, 9898 Lake and the Fairwinds Estate, as those matters were not before the Court. Further, the Plan was filed in the above captioned Debtor's bankruptcy case, and the Debtor is not a party to the Exchange Agreement, nor a party who has rights that stem from the Exchange Agreement. Accordingly, the Court did not

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have authority to approve the sale of non-estate property owned by a non-debtor non-party to the above captioned bankruptcy case, free and clear of all liens claims and interest, when the owner of the property to be sold and its creditors did not have notice of the Plan or the Plan confirmation hearing.

Despite not having made any determination of Paye's rights or causes of action, the Court did consider the briefs filed and the arguments of counsel at the Plan confirmation hearing and the hearing on the Motion to Modify. The Court ultimately confirmed the Plan which included the sale of the Fairwinds Estate real property which is wholly owned by 9898 Lake, a non-party non-debtor entity, to be sold as one of the Debtor's bankruptcy case estate's "Purchased Assets[1]" free and clear of all liens, claims and interests.

In its Findings of Fact and Conclusions of Law the Court found that, "...regardless of any claims that Paye may have [against any non-party non-debtor subsidiary of the Debtor] in connection with the Fairwinds Estate and/or the Exchange Agreement, the transfer of the Fairwinds Estate to the Buyer as provided for under the Plan is fair and permissible under the Bankruptcy Code because the Buyer is paying the [Debtor's] Estate the $35.8 million Purchase Price on account of all of the Purchased Assets, and those assets specifically include the Debtor's ultimate equity interest in the Fairwinds Estate." *See* Findings of Fact and Conclusions of Law, pg. 20, ¶ g. At the confirmation hearing Mr. Haratani, the vice president of Lawrence, testified that there is no specific value out of the purchase price attributed to the Fairwinds Estate, and that there is no intention for 9898 Lake to receive any of the Plan sale proceeds. Hearing Transcript pg. 105, ln 9-15; pg. 115-116.

Among other things the Plan provides for the transfer of the sole asset of 9898 Lake for the benefit of the Debtor, the owner of CR Tahoe, which owns 9898 Lake, and would strip 9898 Lake of any assets and therefore preclude Paye from having any effective remedy for its claims against CR Tahoe, 9898 Lake or the Fairwinds Estate in its

[1] Capitalized terms not defined herein shall have the meaning defined in the Plan.

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adversary proceeding.

Additionally, the Plan provides that certain causes of action and defenses including those related to "Claims arising out of that certain Exchange Agreement concerning the Fairwinds Estate" (the "Retained Causes of Action") shall be sold to and become the property of the Buyer or shall become property of the Litigation Trust.

Also, the Plan provides that "Any Claims arising from the rejection of an executory contract or unexpired lease not filed [by the Claims Bar Date] will be automatically disallowed, forever barred from assertion, and shall not be enforceable against the Debtor, Buyer, the Proponents, or their assets or properties (including the Real Property and the Fairwinds Estate) without the need for any objection by the Debtor or Buyer, or further notice to, or action, order or approval of the Bankruptcy Court."

Further, the Plan provides that "after entry of the Confirmation Order, the Plan authorizes and directs [CR Tahoe] to dissolve, if necessary, and cause 9898 Lake to Transfer by grant deed all of 9898 Lake's right, title and interest in the Fairwinds Estate to the Debtor, subject to the Secured Claim of Capital One. On the Effective Date and as part of the Closing, the Debtor shall transfer the Fairwinds Estate to the Buyer free and clear of all Liens and Claims other than the Secured Claim of Capital One, which shall be treated in accordance with Article IV.B.5 hereof."

Despite the arguments of Paye, the Court confirmed the Plan. Paye's objections to the Plan and the Motion to Modify were generally as follows: 1) Plan did not meeting the requirements of 11 U.S.C. §1129; 2) that the Plan Proponents and the Debtor did not have standing to modify Paye's rights with regard to non-debtor non-party entities, nor did they have standing to modify Paye's rights with regard to the real property owned by the non-debtor non-party subsidiary of the subsidiary of the Debtor; 3) that the Court did not have authority to authorize a plan that would effectuate a fraudulent transfer of the Fairwinds Estate and provide immunity to the people effectuating the fraudulent transfer; 4) that Paye is not a creditor of the Debtor, but that Paye appeared at the confirmation hearing in order to stop the Plan Proponents from modifying Paye's rights to non-debtor

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non-party entities and those entities assets; 5) that Cal Neva, New Cal Neva, CR Tahoe and 9898 Lake are all separate legal entities with their own debts and assets, even when such corporation is wholly owned by another corporate entity; 6) that the Fairwinds Estate cannot be sold with bankruptcy benefits such as being sold free and clear of all liens, claims, and interest when its owner is not a bankrupt; 7) that it was unclear if there are other creditors of the non-debtors or parties in interest that exist which may require notice of such a sale which would cancel their liens, claims or interest with regard to those non-debtor entities and those entities assets; and 8) that the dissolution of CR Tahoe and 9898 Lake contemplated by the Plan was not consistent with the laws of the States of California and Delaware that govern the winding up of 9898 Lake and CR Tahoe respectively.

Pursuant to the Order the bankruptcy court shortened the fourteen (14) day stay imposed by Bankruptcy Rules 6004(h), 6006(d) and 7062 to seven (7) days.

On October 19, 2017, Paye filed its Emergency Motion for Stay Pending Appeal [DE 992] (the "Motion for Stay") with the bankruptcy court. Along with the Motion for Stay, Paye filed the Declaration of John Paye in Support of the Motion for Stay Pending Appeal [DE 1000].

At the hearing on the Motion for Stay held on October 20, 2017, the bankruptcy court considered the arguments of the parties in opposition to the Motion for Stay, and the arguments of Paye in support. The bankruptcy judge granted a limited stay to Paye through October 25, 2017 at 5:00 p.m. without bond, but denied Paye's Motion for Stay because the bankruptcy court did not hear anything that would cause it to reconsider its Findings of Fact and Conclusions of Law. The bankruptcy court believed Paye had a strong argument, but was not persuaded Paye's arguments rose to a strong level of likely success. Further the bankruptcy court did not find mootness alone was an irreparable injury. Further, the bankruptcy court determined that the creditors of the Debtor's bankruptcy case estate would be harmed because they would not receive any money today and there is no indication that another buyer exists. The bankruptcy court found that there

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was a public interest in maximizing the value of the Debtor's bankruptcy case estate, and thought that Paye had a possibility of money damages against CR Tahoe, 9898 Lake and the Fairwinds Estate.

As discussed below, the issues in this case are serious, substantial, and complex, and could ultimately affect many Chapter 11 bankruptcy cases. Accordingly, Paye respectfully requests the Court issue a discretionary stay pursuant to Bankruptcy Rule 8007 pending Paye's appeal from this Court's Orders in order to maintain the *status quo.* Specifically, if Paye does not obtain a stay, Paye will lose its right to appeal on account of mootness. If the Plan is implemented, the appeal will become moot. Additionally, Paye may lose its rights with regard to the Exchange Agreement and any effective remedies it would otherwise have against CR Tahoe, 9898 Lake and or the Fairwinds Estate real property. If a stay is not issued, Paye will effectively be left holding an empty bag, despite its viable claims against Cal Neva, CR Tahoe, 9898 Lake and the Fairwinds Estate. It cannot stand that the Plan in the case of a debtor who has no privity with Paye, could so substantially wipeout Paye's rights and recoveries against non-debtor non-parties and those non-debtor non-parties assets.

B. LEGAL BASIS FOR RELIEF REQUESTED

1. Standard of Review

Rule 8007 of the Federal Rules of Bankruptcy Procedure permits a bankruptcy court to grant a discretionary stay pending appeal, and provides:

> A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. . . .

In re Zaleha, 162 B.R. 309, 317 (Bankr. D. Idaho 1993). Appellate Rule 8(a) states that a motion for stay may be made to the court of appeals if the motion was first brought before the bankruptcy court and was denied.

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Where the bankruptcy court has already denied a stay under Federal Rule of Bankruptcy Procedure 8005, the appellate court's review is limited to a determination as to whether the bankruptcy court abused its discretion. Wymer v. Wymer (In re Wymer), 5 B.R. 802 (B.A.P. 9th Cir. 1980); Ohanian v. Irwin (In re Ohanian), 338 B.R. 839, 844 (E.D. Cal. 2006); North Plaza, LLC., v. Kipperman (In re North Plaza, LLC), 395 B.R. 113, 119 (S.D. Cal. 2008). The abuse of discretion standard on review of the bankruptcy court's order denying a stay encompasses a *de novo* review of the law, and a clearly erroneous review of the facts. In re Ohanian, 338 B.R. at 844, 848; In re North Plaza, LLC, 395 B.R. at 119.

2. Review of Law

Under Rule 8007, an appellant seeking a stay pending appeal must essentially meet a test akin to that used for preliminary injunctions under Federal Rule of Civil Procedure 65. In re Station Casinos, Inc., 2010 Bankr. LEXIS 5438, at *8. Thus, in order to obtain a discretionary stay pending appeal, the appellant must establish each of the following four elements by a preponderance of the evidence: (1) the appellant is likely to succeed on the merits, (2) the appellant will suffer irreparable injury if the stay is not granted, (3) no substantial harm will come to the appellee as a result of the stay, and (4) the stay will do no harm to the public interest. Id., at *8; In re Wymer, 5 B.R. 802, 806 (9th Cir. 1980); Countrywide Home Loans, Inc. v. Wilkerson (In re O'Kelley), 2010 U.S. Dist. LEXIS 108096 (D. Hawaii, October 8, 2010); In re North Plaza, LLC, 395 B.R. 113, 119 (S.D. Cal. 2008). The first two factors are the most important. *See* In re Woodcraft Studios, Inc., 2012 U.S. Dist. LEXIS 5647, *3 (N.D. Cal., January 18, 2012). "[T]he issues of likelihood of success and irreparable injury represent two points on a sliding scale in which the required degres of irreparable harm increases as the probability of success decreases." In re Orange County Nursery, 2012 U.S. Dist. LEXIS 52482 (C.D. Cal. April 13, 2012), *citing* Humane Soc'y of U.S. v. Gutierrez, 523 F.3d 990, 991 (9th Cir. 2008) (*citing* Golden Gate Rest. Ass'n v. City & County of San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008)).

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Some courts in this Circuit have applied a test that is more rigorous than that used for preliminary injunctions. *See, e.g.*, Dynamic Fin. Corp. v. Kipperman (In re North Plaza, LLC), 395 B.R. 113, 120 (S.D. Cal. 2008) (rejecting sliding scale approach and holding that "[a]ppellants [must] show that it is more likely than not they will succeed on the merits, whatever the possibility of irreparable injury"); In re Red Mountain Machinery Co., 451 B.R. 897, 900 (Bankr. D. Ariz. 2011) ("[B]oth the Supreme Court and the Ninth Circuit have raised the bar on the showing of irreparable injury, now requiring a showing that 'an irreparable injury is the more probable or likely outcome' if the stay is not granted.") (citing Leiva-Perez, 640 F.3d at 967). Other courts, however, have used the same exact test as that used for preliminary injunctions - i.e., to obtain a stay pending an appeal, an appellant "must show: (1) a likelihood of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits are raised and the balance of the hardships tips sharply in its favor." Lynch v. Cal. PUC, No C-04-0580 VRW, 2004 U.S. Dist. LEXIS 6022, at *6 (N.D. Cal. April 9, 2004).

The Court in Station Casinos, Inc., *supra*, followed the approach taken in In re North Plaza, LLC, and explained:

> The Court rejects the UCC's assertion that a more flexible sliding scale test should be used, balancing a showing of likelihood of success on the merits with the possibility of irreparable injury. In *Winter v. National Resources Defense Council*, the United States Supreme Court made clear that the showing of a possibility of irreparable harm is not sufficient; the party seeking an injunction or stay must demonstrate the likelihood of irreparable harm *and* a likelihood of prevailing on the merits. *Winter v. National Resources Defense Council*, 555 U.S. 7, 129 S. Ct. 365, 375, 172 L. Ed. 2d 249 (2008). Additionally, the sliding scale approach ignores the procedural posture of a stay under Rule 8005, when the movant is appealing a bankruptcy court's final determination on the merits. *In re North Plaza, LLC*, 395 B.R. 113, 120 (S.D. Cal. 2008). As the *North Plaza* court stated, "[a] 'sliding scale' approach, which often results in disproportionately weighting the 'irreparable harm' prong, is appropriate for preliminary injunctions because a court deals with the dispute on first impressions, relies on a less-than-developed factual and legal record, and will ultimately revisit the issue down the road. In contrast, where, as here, a court has taken extensive evidence and briefing an issued a determination on the merits, an interest in finality arises. This finality would be rendered impotent if an enjoined party could always raise the specter of irreparable injury to trump the trial court's order, no matter how unlikely an appellate victory on the merits." *Id.*

The *North Plaza* decision is consistent with the Supreme Court's opinion in

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> Winter, and the Court finds that application of the four-part analysis under *Wymer* is appropriate for the UCC's Motion for Stay. The four elements are conjunctive and each factor must be shown by a preponderance of the evidence. *Haskell v. Goldman, Sachs & Co. (In re Genesis Health Ventures, Inc.)*, 367 B.R. 516, 519 (Bankr. D. Del. 2007) (motion may be denied if movant fails to make requisite showing on any single factor).

Id., at *8-10. As shown below, Paye has met all four elements.

DISCUSSION

1. The Issues On Appeal Are Serious And Substantial, And It Is Probable that Paye Will Succeed On The Merits.

Showing a "likelihood of success" requires that the appellant raise questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate inquiry. In re North Plaza, LLC, 395 B.R. 113 (S.D. Cal. 2008), *citing* County of Alameda v. Weinberger, 520 F.2d 344, 349 n. 12 (9th Cir. 1975).

In the present case, the core issues are: 1) whether the Plan satisfied the requirements of 11 U.S.C. §1129; 2) whether the Plan Proponents had standing to modify Paye's rights with regard to non-debtor non-party entities and those entities real property; 3) whether the Court had authority to confirm a plan that would effectuate a fraudulent transfer of the Fairwinds Estate and provide immunity to the people effectuating the fraudulent transfer; 4) whether a bankrupt can collapse non-debtor entities with known creditor claims and shield the assets of those collapsed entities from those entities' creditors; 5) whether the Fairwinds Estate can be sold with bankruptcy benefits such as being sold free and clear of all liens, claims, and interest when the owner of the Fairwinds Estate is not a bankrupt, and the Fairwinds Estate owner entity has not been collapsed into the Debtor in advance of confirmation; 6) Whether the Plan provided adequate notice to those parties whose rights the Plan affects, including the creditors of the non-debtor non-party entities whose assets, but not liablities, are to be collapsed into the Debtor; 7) whether the dissolution of CR Tahoe and 9898 Lake contemplated by the Plan is inconsistent with the laws of the States of California and Delaware that govern the winding up of 9898 Lake and CR Tahoe respectively; and 8) whether the bankruptcy

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court confirmed a Plan that violated Paye's due process rights.

(A) The Plan Fails §1129(a)(3) Requirement.

In order for a plan to be confirmed it cannot be proposed by means forbidden by law. "Means forbidden by law" refers inter alia to state law. See In re Landau Boat Co., 13 Bankr. 788, 794 Bankr. W.D. Mo. 1981); In re Koelbl, 751 F.2d 137, (2d Cir. 1984); 5 Collier on Bankruptcy para. 1129.02, at 1129-13 (15th ed. 1984) ("Section 1129(a)(3) requires that the proposal of the plan comply with all applicable law, not merely the bankruptcy law.").

The Plan provides that the Fairwinds Estate real property which is wholly owned by 9898 Lake will be sold by the Debtor as one of the Debtor's bankruptcy case estate's "Purchased Assets". As set forth above, the Fairwinds Estate is an asset of 9898 Lake, not the Debtor, and therefore, cannot be sold under the Plan.

Additionally, the Plan provides that certain causes of action and defenses including those related to "Claims arising out of that certain Exchange Agreement concerning the Fairwinds Estate" (the "Retained Causes of Action") shall be sold to and become the property of the Buyer if sold or assigned to Buyer under the Asset Purchase Agreement or Buyer's Bid Contract and shall be property of the Litigation Trust if not so sold or assigned. The Debtor was not a party to the Exchange Agreement concerning the Fairwinds Estate, and therefore cannot sell or confer upon a Buyer or the Litigation Trust that which it does not have.

Also, the Plan provides that "Any Claims arising from the rejection of an executory contract or unexpired lease not filed [by the Claims Bar Date] will be automatically disallowed, forever barred from assertion, and shall not be enforceable against the Debtor, Buyer, the Proponents, or their assets or properties (including the Real Property and the Fairwinds Estate) without the need for any objection by the Debtor or Buyer, or further notice to, or action, order or approval of the Bankruptcy Court." This provision of the Plan seeks to limit a third party's or creditor's right to pursue the Fairwinds Estate, a non Debtor Real Property, even if there is a contractual or other legal

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right to do so. This provision cannot stand.

Cal Neva, New Cal Neva, CR Tahoe and 9898 Lake are all separate entities. It is a fundamental precept of corporate law that each corporation is a separate legal entity with its own debts and assets, even when such corporation is wholly owned by another corporate entity. See Turner v. Turner, 147 Md.App. 350, 809 A.2d 18, 61 (Md.Ct.Spec.App.2002) (noting that "[a] corporation is regarded as a separate legal entity"); Mylan Labs., Inc. v. Akzo, N.V., 2 F.3d 56, 62 (4th Cir.1993) (noting that Maryland courts generally will not pierce the corporate veil between a parent and a subsidiary corporation if the subsidiary has some independent reason for its existence, other than being under the complete domination and control of another legal entity simply for the purpose of doing its act and bidding" (internal quotation marks omitted)) *see also,* Delaware Code, Title 6, §18-201 through §18-216 ("A limited liability company formed under this chapter shall be a separate legal entity"). 9898 Lake does not exist to do CR Tahoe or New Cal-Neva's bidding; it was established to hold title to property. 9898 Lake is a distinct legal entity. Had CR Tahoe and 9898 Lake wished to receive the protections and benefits afforded by § 1129, they must have filed for bankruptcy. 9898 Lake and CR Tahoe are a limited liability companies under California and Delaware law respectively, and under California and Delaware law, an LLC is treated as a separate legal entity for purposes of liability and property ownership.

The Plan is an example of putting the cart before the horse, in that the Plan Proponents sought to sell assets that are not property of the bankruptcy case estate, and they failed to take the necessary legal action to properly acquire those asset in advance of plan confirmation.

The Debtor's estate does have an interest in CR Tahoe and this interest in the non-debtor subsidiary corporation does form part of the Debtor's bankruptcy estate. *See , e.g. Amphenol v. Shandler (In re Insilco Technologies, Inc.)*, 351 B.R. 313 (Bankr. D. Del. 2006) (sale of debtor's assets and shares of its non-debtor subsidiary through 363(b) approved by the court). The fact that a parent corporation has an ownership interest in a

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subsidiary, however, does not give the parent any direct interest in the assets of the subsidiary. Kreisler v. Goldberg, 478 F.3d 209, (4th Cir. 2007). Although the Debtor could have established an ownership interest in the Fairwinds Estate, it chose not to do so. Instead, it created an LLC for the purpose of holding membership in a second LLC for the purpose of holding title to the property. Having assumed whatever benefits flowed from that decision, it cannot now ignore the existence of the LLCs in order to escape the LLCs disadvantages. See Terry v. Yancey, 344 F.2d 789 (4th Cir.1965) (explaining that "where an individual creates a corporation as a means of carrying out his business purposes he may not ignore the existence of the corporation in order to avoid its disadvantages"). There is a legally significant distinction between the Debtor's interest in CR Tahoe, CR Tahoe's interest in 9898 Lake and 9898 Lake's direct ownership interest of the Fairwinds Estate real property. The assets of 9898 Lake belong to 9898 Lake and do not form part of the Debtor's bankruptcy estate.

The Plan did not provide any legal mechanism to collapse the assets of the non-debtor subsidiaries of the Debtor into the Debtor. The collapsing of entities is generally recognized in three contexts, (1) piercing the corporate veil, (2) substantive consolidation in bankruptcy and (3) leveraged buy out transactions, none of which are present here. At the Plan confirmation hearing the Court specifically held that it was not substantively consolidating the Debtor with its non-debtor subsidiaries, and noone was arguing for the other recognized collapsing mechanisms.

Further, Lawrence has contingencies to the purchase of the Purchased Assets including that the Purchased Assets, including the Fairwinds Estate, be sold free and clear of all liens, claims and interests at Closing. Paye claims an interest in 9898 Lake, and has claims against CR Tahoe, the Fairwinds Estate, and 9898 Lake. The Fairwinds Estate cannot be sold free and clear of those claims or interests. Additionally, it is unclear if there are other creditors or parties in interest exist which may require notice of such a sale which would cancel their liens, claims or interest. Specifically, the Plan provides that "after entry of the Confirmation Order, the Plan authorizes and directs [CR Tahoe] to

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dissolve, if necessary, and cause 9898 Lake to Transfer by grant deed all of 9898 Lake's right, title and interest in the Fairwinds Estate to the Debtor, subject to the Secured Claim of Capital One. On the Effective Date and as part of the Closing, the Debtor shall transfer the Fairwinds Estate to the Buyer free and clear of all Liens and Claims other than the Secured Claim of Capital One, which shall be treated in accordance with Article IV.B.5 hereof."

The dissolution and windup for both CR Tahoe and 9898 Lake are governed by Delaware and California law respectively. Both require that upon dissolution a windup occur. Winding up the LLCs requires that the assets of the LLCs be sold and the creditors be paid. Capital One and Paye are entitled to payment from the sale of assets ahead of CR Tahoe which entity is ahead of the Debtor. *See* Delaware Code, Title 6, §18-804 Distribution of Assets ("upon the winding up of a limited liability company, the assets shall be distributed as follows: (1) to creditors, including members and managers who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited liability company..."); *see also* Cal Corp Code Article 7 Dissolution and Winding Up §17707.04 through 17707.06 (assets sold and creditors paid first, ahead of members). Further even after a cancellation statement is filed the entity will still exist to sue and be sued for purposes of winding up. The Plan cannot short cut the state law requirements for dissolving the non-debtor entities, limit creditors and interest of those non-debtor entities, or cause the non-debtor entities to sell their sole asset, the Fairwinds Estate to the detriment of those non-debtor entities creditors. At best, the Debtor had its membership interest in CR Tahoe to sell to the Buyer.

Accordingly, because the Plan does not provide a legal means of acquiring the assets of the non-party non-debtor subsidiary of the subsidiary of the Debtor, and does not provide a legal means of collapsing the assets but not the liabilities of CR Tahoe and 9898 Lake into the Debtor in order to effectuate their sale, the Plan Proponent's sale of non-estate assets under their Plan has been proposed by a means forbidden by law, and the Plan fails 11 U.S.C. §1129(a)(3).

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(B) The Plan Fails §1123(a)(5) Requirement.

11 U.S.C. §1123(a)(5) provides in relevant part that, "(a) notwithstanding any otherwise applicable nonbankruptcy law, a plan shall (5) provide adequate means for the plan's implementation, such as – (B) transfer of all or any part of the property of the estate to one or more entities" and (D) sale of all or any part of the property of the estate, either subject to or free and clear of liens..." Here, the Plan fails for want of providing adequate means for implementing the plan. The bankruptcy code does not confur upon the Debtor or the presiding Judge the ability to modify rights and sell assets of non-debtor entities free and clear of lines or interests. Accordingly, as set forth more fully above, the plan fails because the described means of implementing the Plan- by selling the real property of the non-debtor subsidiary of the non-debtor subsidiary free and clear of claims liens and interest– is not permitted by the bankruptcy code.

(C) The Plan Causes a Fraudulent Transfer of the Fairwinds Estate and provides immunity to the people effectuating the fraudulent transfer

Paragraph 13 of the Confirmation Order provides that the Debtor shall: "(b) consistent with Section B of Article VI of the Plan, cause a duly executed and acknowledged grant deeds transferring all of 9898 Lake's right, title and interest in the Fairwinds Estates to Debtor (and subsequently to Buyer) to be recorded in the Official Records of Placer County California after the expiration of the stay of this Confirmation Order."

(D) The Transfer of the Fairwinds Estate is a Fraudulent Transfer that the Court cannot Exonerate.

Cal. Civ. Code § 3439 et seq. embodies the current regime of California law – known as the Uniform Fraudulent Transfer Act. The UFTA prohibits debtors from transferring or placing property beyond the reach of their creditors when that property should be available for the satisfaction of the creditors' legitimate claims. A transfer under the UFTA is defined as "every mode, direct or indirect, absolute or conditional,

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voluntary or involuntary, of disposing of or parting with an asset …, and includes payment of money, release, lease, and creation of a lien or other encumbrance." Cal. Civ. Code § 3439.01(i).

UFTA provides remedies only to those creditors to whom a debt, as defined in § 3439.01, is owed. Whether the creditor's claim arose before or after the debtor made the transfer or incurred the obligation, four (4) distinct grounds for finding a fraudulent transfer exist:

(i) Cal. Civ. Code § 3439.04(a)(1) designates as fraudulent any transfer made or obligation incurred by a debtor with actual intent (determination of "actual intent" depends on the assessment of eleven factors, see infra Actual Fraudulent Intent for § 3439.04(a)(1) Determined by § 3439.04(b)) to hinder, delay, or defraud any creditor of the debtor;

(ii) Cal. Civ. Code § 3439.04(a)(2)(A) designates as fraudulent (and presumes fraudulent intent) a transfer made or obligation incurred ***without receiving reasonably equivalent value*** where the debtor was engaged or about to engage in a business or transaction with ***unreasonably small remaining assets*** in relation to the business or transaction (emphasis added);

(iii) Cal. Civ. Code § 3439.04(a)(2)(B) designates as fraudulent (and presumes fraudulent intent) a transfer made or obligation incurred without receiving reasonably equivalent value where the debtor intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as the debts became due;

(iv) Cal. Civ. Code § 3439.05 designates as fraudulent (and presumes fraudulent intent) a transfer made or obligation incurred without receiving reasonably equivalent value where the debtor was insolvent at the time of making the transfer or incurring the obligation or ***became insolvent as a result of the transfer*** or obligation. (emphasis added)

It is not necessary that the transferor acted maliciously or with a desire to harm his

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creditors. See Economy Refining & Service Co. v. Royal Nat'l Bank (1971) 20 Cal. App. 3d 434, 441. The Economy Refining & Service Co. Court held that it was the debtor's intent to make the transfer, rather than some evil intent to harm the creditor, which sufficed for finding intent to defraud. Id. ("actual intent to defraud consisted of the intent [. . .] to remove the assets and to make impossible the collection of appellant's judgment"). Furthermore, in the words of one court:

> Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. [. . .] It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.

Mehrtash v. Mehrtash (2001) 93 Cal. App. 4th 75, 80.

The "actual intent" referred to in § 3439.04(a)(1) is determined upon consideration of eleven (11) factors set out in § 3439.04(b). See also Filip v. Bucurenciu (2005) 129 Cal. App. 4th 825, 834 (factors are not mathematical formula, but to provide guidance to court, not compel finding one way or other). Cal. Civ. Code § 3439.04(b) states:

In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:

> (1) Whether the transfer or obligation was to an insider.
>
> (2) Whether the debtor retained possession or control of the property transferred after the transfer.
>
> (3) Whether the transfer or obligation was disclosed or concealed.
>
> (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (5) Whether the transfer was of substantially all the debtor's assets.
>
> (6) Whether the debtor absconded.
>
> (7) Whether the debtor removed or concealed assets.
>
> (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

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(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.

(11) Whether the debtor transferred the essential assets of the business to a lien holder who transferred the assets to an insider of the debtor.

There are two (2) forms of constructive fraud grounding creditor claims which arose either before or after the transfer under the UFTA. The first, Cal. Civ. Code § 3439.04(a)(2)(A), provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and "[w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction." The second, Cal. Civ. Code § 3439(a)(2)(B), provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and "[i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due."

Related, Cal. Civ. Code § 3439.05 provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and "was insolvent at that time or . . . became insolvent as a result of the transfer . . . ." Cal. Civ. Code § 3439.02 defines insolvency and § 3439.02(c) allows a presumption of insolvency where a debtor is generally not paying his debts as they become due. In other words, this section acts to prevent a debtor from transferring his last assets at unreasonably low value, thereby depriving the creditor of an existing claim on the assets, if the debtor was insolvent or became insolvent because of the transfer.

Here, the Fairwinds Estate has a first priority lien held by Capital One. The debt on that obligation has not been paid for some time and there have been threats of foreclosure from Capital One. Further, pursuant to the Plan Proponents' Plan and as represented at the confirmation hearing, while the Fairwinds Estate is "part of the Purchased Assets (as defined in the Plan)" zero dollars ($0) from the sale will go to 9898 Lake. Further, the Plan provides:

After entry of the Confirmation Order, this Plan authorizes and directs

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> [CR Tahoe] to dissolve, if necessary, and cause 9898 Lake to transfer by grant deed all of 9898 Lake's right, title and interest in the Fairwinds Estate to the Debtor, subject to the Secured Claim of Capital One. On the Effective Date and as part of the Closing, the Debtor shall transfer the Fairwinds Estate to the Buyer free and clear of all Liens and Claims other than the Secured Claim of Capital One, which shall be treated in accordance with in Article IV.B.5 hereof.

In its Objections and at the confirmation hearing Paye asserted that it has claims against CR Tahoe, 9898 Lake and the Fairwinds Estate. By allowing the Plan to be confirmed the Court asserted jurisdiction and authority over the non-debtor non-party separate legal entity CR Tahoe and approved CR Tahoe's dissolution without any notice to its creditors and without consideration for Delaware's wind-down process, and the Court has asserted jurisdiction and authority over the non-debtor separate legal entity 9898 Lake and approved 9898 Lake's transfer its only asset, or substantially all of its assets, by grant deed for no value to the Debtor, an insider. The Plan leaves creditors of CR Tahoe and 9898 Lake, two non-debtor non-party entities, holding an empty bag. These transfers involve CR Tahoe and 9898 Lake affirmatively moving property beyond the reach of their creditors when that property should be available for the satisfaction of their creditors' legitimate claims. The confirmed Plan approves the fraudulent transfer and windup without regard to state law.

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). Here, the transfer of the Fairwinds Estate and windup of the two non-debtor non-party entities is governed by state law, and the bankruptcy court has ignored the procedure for winding up the affairs of CR Tahoe and 9898 Lake.

(E) Jurisdiction and Standing.

In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. Warth v. Seldin, 422 U.S. 490, 498 (1975). This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. E.g., Barrows v. Jackson, 346 U.S. 249, 255-256 (1953). In both dimensions it is founded in concern about the proper -- and

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properly limited -- role of the courts in a democratic society. See Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 221-227 (1974); United States v. Richardson, 418 U.S. 166, 188-197 (1974) (POWELL, J., concurring). Paye asserts that the Plan Proponents and the Debtor do not have standing to affect its rights with regard to the non-party non-debtor entities and the real property of the subsidiary of the subsidiary of the Debtor, and that the Court does not have authority to grant the Plan Proponents and/or the Debtor the ability to modify, limit or extinguish Paye's claims against the non-party non-debtor entities and the real property of the subsidiary of the subsidiary of the Debtor. Paye argues that the Plan violates Paye's due process rights. Further, Paye asserts that the bankruptcy court does not have authority to sell assets of non-debtors with the protections only afforded bankrupt debtors, such as selling the Fairwinds Estate free and clear of Paye's rights claims and interests and extinguishing Paye's claims against 9898 Lake, and finally, leaving Paye without any source of recovery for its known claims against CR Tahoe, 9898 Lake and the Fairwinds Estate.

2. Paye Will Be Irreparably Injured If The Order Is Not Stayed

The Court must consider whether Paye will suffer irreparable injury if the stay is not granted. To obtain a stay, Paye must demonstrate a "reasonable likelihood of future injury." <u>In re Smith</u>, 397 B.R. 134, 146 (Bankr. D. Nev. 2008) (*quoting* <u>Bank of Lake Tahoe v. Bank of America</u>, 318 F.3d 914, 918 (9th Cir. 2003) (discussing issuing prospective injunctions)). An irreparable injury is one that is not remote or speculative, but instead is actual and imminent and for which money damages would not be adequate compensation. <u>In re Station Casinos, Inc.</u>, 2010 Bankr. LEXIS 5438 (Bankr. D. Nev., July 26, 2010); <u>In re PTI Holding Corp.</u>, 346 B.R. 820, 827 (Bankr. D. Nev. 2006).

In evaluating the element of irreparable harm, it is necessary to analyze the risk that an appeal would be mooted in the absence of a stay. Loss of appellate rights is a "quintessential form of prejudice." <u>In re Adelphia Comm. Corp.</u>, 361 B.R. 337, 348 (S.D. N.Y. 2007), *citing* <u>In re Country Squire</u>, 203 B.R.182, 183 (B.A.P. 2nd Cir. 1996). "Thus, where denial of a stay pending appeal risks mooting any appeal of significant

claims of error, the irreparable harm requirement is satisfied." Id.

Injunctive relief is appropriate where threatened conduct will likely cause a party irreparable harm. Chalk v. U.S. District Court Cent. Dist. Of Cal., 840 F.2d 701 (9th Cir. 1988). It is well-settled that "irreparable harm consists of harm that cannot be remedied by an award of monetary damages, or an injury that cannot be quantified monetarily. Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 18(1st Cir. 1996); Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 91 (3rd Cir. 1992).

In California, real property has historically been held to be unique. If the Court does not issue a stay pending appeal, and the Plan is implemented, Paye will be irreparably harmed by the loss of its first right of offer to acquire the Fairwinds Estate. The loss of real property cannot be compensated by money damages because it is unique.

As set forth above, Paye has filed an adversary proceeding in a separate bankruptcy case to enforce its rights with regard to the Exchange Agreement and its option to purchase either the membership interests in 9898 Lake or the Fairwinds Estate. In the event a stay is not issued and the Fairwinds Estate is transferred away from 9898 Lake, the real property and the proceeds from the sale thereof will be beyond the reach of Paye, Paye will be left with no effective remedy against the non-debtor defendants in its pending adversary action, and Paye will suffer irreparable harm.

Further, the injury suffered by Paye cannot be remedied by an award of money damages, and will result in an injury that cannot be quantified monetarily. It is a familiar legal principal that a damage award is generally an inadequate remedy for a breach of contract involving real estate and, therefore, courts routinely grant a plaintiff's request for specific performance. Real Estate Analytics, LLC v. Vallas, 160 Cal. App. 4th 463, 473 (2008); (See Thompson & Sebert, Remedies: Damages, Equity and Restitution (2d ed. 1989) pp. 885–886.) Courts use special treatment for land sale contracts, reflecting the enduring view that: (1) each parcel of land is unique and therefore there can be no adequate replacement after a breach; and (2) monetary damages are difficult to calculate after a party refuses to complete a land sales contract, particularly expectation damages.

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Real Estate Analytics, LLC, 160 Cal. App. 4th at 473; (See Rest.2d Contracts, § 360.)

In California, these principles are embodied in Civil Code section 3387. Section 3387 states: "It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. In the case of a single-family dwelling which the party seeking performance intends to occupy, this presumption is conclusive. In all other cases, this presumption is a presumption affecting the burden of proof." The rebuttable presumption shifts the burden of proof to the breaching party to prove the adequacy of the damages. By so doing, the Legislature intended that a damages remedy for a non-breaching party to a commercial real estate contract is the exception rather than the rule. Real Estate Analytics, LLC, 160 Cal. App. 4th at 473.

In California there is a dearth of appellate court decisions addressing the issue of the scope of the breaching party's burden to rebut presumption that the damages remedy is inadequate when the buyer sought to purchase the property for a commercial or investment purpose. Id. Courts generally assume the uniqueness of land and grant specific performance after a breach of a land sale contract in both residential and commercial contexts, with little or no discussion of the adequacy of remedy issue. Id.

The real property at issue here is the Fairwinds Estate. The Fairwinds Estate was built in 1934. It is made up of a residence with over nine (9) bedrooms and nine (9) bathrooms, a great room, full kitchen, a detached guest unit with full kitchen, loft, bedroom, and bathroom, and a detached large storage unit/small garage. The Fairwinds Estate has approximately 300 linear feet of frontage on Lake Tahoe and a private pier. Further, the Fairwinds estate has special sentimental value to Paye as its members have spent over 30 years visiting the Fairwinds Estate with family and Friends.

If a stay pending appeal is not issued, and the Fairwinds Estate is lost through a sale to Lawerence contemplated by the Order, any court will be unable to make Paye whole if it is successful on its complaint in the adversary action, as there would be an inadequate remedy at law.

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3. Other Interested Parties Will Not Be Harmed As A Result Of The Stay.

The purpose of a stay pending appeal is to preserve the *status quo.* In re Victory Constr. Co., Inc., 37 B.R. 222, 226 (9th Cir. BAP 1984) ("[t]he essence of the protection under Rule 8005, like the protection under Sec. 361, is the maintenance of the status quo"); Vacation Village, Inc. v. Clark County, Nev., 497 F.3d 902, 914 (9th Cir. 2007) ("Rule 62(d) is a purely procedural mechanism to preserve the status quo during a stay pending appeal of a district court decision").

The Plan Proponents have argued that the creditors of the bankruptcy case estate will be harmed if a stay pending appeal is imposed, as the Plan will not become effective, the Buyer under the Plan may walkaway, and there is no evidence that another purchaser exists to acquire the same assets (both estate and non-estate) for as much as Lawrence was willing to pay. Paye is not a creditor of this bankruptcy case estate. Paye has objected to the Plan because the Plan illegally seeks to modify Paye's rights to non-debtor non-party entities and those entities' assets. The Court cannot put the creditors of the Debtor's bankruptcy case estate ahead of the creditors of CR Tahoe and 9898 Lake with regard to rights and claims against those non-debtor entities and those non-debtor entities' assets, including the Fairwinds Estate. The Debtor is merely an equity holder in CR Tahoe and CR Tahoe is an equity member of 9898 Lake. The creditors of 9898 Lake must be satisfied by 9898 Lake's assets ahead of CR Tahoe, and CR Tahoe's creditors must be satisfied by the assets of CR Tahoe head of the Debtor and the Debtor's creditors.

Further, the Debtor and its affiliates have abandoned making any payments on the Fairwinds Estate secured claim, and have failed to care for the property. During the winter of 2016 the Fairwinds Estate was falling to waste, had vandalism, and theft when Paye entered into an agreement to keep up the Fairwinds Estate, and it has been doing so since June 1, 2017. Given the opportunity, Paye will continue to keep with its care taking of the Fairwinds Estate pending the appeal. Further, the resort property will continue to be maintained as secure, and the roof repair may proceed. Accordingly, balancing the relative hardships sharply favor protecting Paye's rights against the non-debtor

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subsidiaries of the Debtor and those non-debtor subsidiaries' assets. The Motion for Stay must be granted.

4. A Stay Is In The Public Interest

In deciding whether to grant preliminary injunctive relief, Court must "pay particular regard for the public consequences ...." Winter, *supra*, 129 S.Ct. at 376-77. The public has an interest in the successful and just resolution of the affairs of a bankrupt debtor. *See* In re PTI Holding Corp., 346 B.R. 820, 832-33 (Bankr. D. Nev. 2006); In re Stadium Management Corp., 95 B.R. 264, 269 (Bankr. D. Mass 1988); In re Monroe Well Service, Inc., 67 B.R. 746, 756 (Bankr. E.D. Pa. 1986). The Plan Proponents argue that public policy strongly favors the bankruptcy case being administered, that bankruptcy sales are final, and that public policy favors maximizing the Debtor's estate and facilitating reorganization. Here, this is a plan of liquidation, not reorganization, and the Plan seeks to sell assets of a non-debtor subsidiary with bankruptcy benefits (free and clear of liens, claims and interests) even thought the subsidiary is not a bankrupt. The Plan ignores both federal bankruptcy law and state law, and seeks to effectuate a sale by a means forbidden by law.

Here public interest favors maintaining the status quo during the pendency of this appeal. Further, the public interest is served by ensuring that jurisdictional, authoritative, standing and due process requirements are met. Public interest is served by ensuring the law of the land is being properly carried out, and that parties in interest have adequate means of defending their rights.

5. Paye Should Not Be Required To Post A Bond

Paye should not be rquired to post a supersedeas bond if this Court grants a stay pending appeal. In order to determine whether a bond should be ordered to protect the appellee, the court must first determine whether this is an instance where a supersedeas bond is appropriate. In order to determine whether a bond is appropriate, this court should look to the Federal Rules of Bankruptcy Procedure. Rule 7062 incorporates the provisions of Rule 62 of the Federal Rules of Civil Procedure. Rule 62(d) states:

> When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

The posting of a supersedeas bond is not the exclusive means by which a party may obtain a stay pending appeal. Courts routinely exercise their discretion to permit parties to post alternative security in lieu of a supersedeas bond to secure a judgement pending appeal. *See e.g.* United States v. Boyce, 148 F. 2d 1069, 1096 (S.D. Cal 2001) ("The Court can...approve the posting of alternative security [in lieu of a supersedeas bond]."); Townsend v.Holman Consulting Corp., 929 F.2d 1359 (9th Cir. 1991); Int'l Telemeter, Corp. v. Hamlin Int'l Corp., 754 F.2d 1492, 1495 (9th Cir. 1985) (approving placing finds in escrow account as an alternative form of judgment guarantee); Olympia Leasing Equip. Co. v. Western Union Tel. Co., 786 F.2d 794, 797-98 (7th Cir. 1986) (affirming decision allowing appellant to pledge cash and accounts receivable and a grant of a security interest in lieu of supersedeas bond.) In appropriate circumstances court's waive the bond requirement altogether. *See e.g.* Dillon v. City of Chicago, 866 F.2d 902, 904-905 (7th Cir. 1988).

The initial issue is whether this appeal falls within Rule 62(d). Cases are uniform in concluding that Rule 62(d) pertains primarily, if not exclusively, to monetary judgments. In re Fullmer, 323 B.R. 287, 291 (Bankr. D. Nev. 2005) (citations omitted). "Courts have restricted the application of Rule 62(d)'s automatic stay to judgments for money..." Hebert v. Exxon Corp., 953 F.2d 936, 938 (5th Cir. 1992). *See also,* In re Capital West Investors, 180 B.R. 240, 242-43 (N.D. Cal. 1995), rev'd on merits after stay denied, 186 B.R. 497 (N.D. Cal. 1995) (appeal from plan confirmation order not subject to Rule 62(d)). Here, the appeal is not an appeal of a monetary judgement, but of a confirmed plan, and therefore, a supersedeas bond is not required. Further, Paye is not a creditor of the bankruptcy case estate and hardly a party in interest save for the Plan's substantial modification of Paye's rights and remedies against non-debtor non-parties and

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those non-debtor non-party's assets. Accordingly, Paye should not be required to post a bond. Further, Paye agrees to continue to maintain the Fairwinds Estate pending its appeal. The only way to maintain the *status quo* is to implement a stay. The balancing the relative hardships weigh sharply in favor of granting the Motion for Stay.

D. CONCLUSION

Based upon the foregoing, Paye has satisfied all four elements required for a discretionary stay under Bankruptcy Rule 8007, and Appellate Rule 8(a). Paye has shown a likelihood of success on the merits and that it will be irreparably harmed if a stay is not granted. The harm to Paye if a stay is not granted far outweighs the harm to creditors of the Debtor's bankruptcy case estate, especially in light of the fact that Paye will continue to maintain the Fairwinds Estate during the pendency of its appeal. Finally, the public interest is best served by imposing a stay and protecting the due process rights of Paye.

WHEREFORE, Paye respectfully requests the Court grant a discretionary stay of the Order and the Chapter 11 proceedings pending the appeal on this matter.

DATED this 23rd day of October, 2017.

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By: */s/ Holly E. Estes*
HOLLY E. ESTES, ESQ.
Paul and Evy Paye, LLC

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CERTIFICATE OF SERVICE

I, Holly E. Estes, Esq., hereby certify that on the 23rd day of October, 2017, the foregoing document was served on all persons listed on the Notice of Electronic Filing through the ECF System.

/s/ Holly E. Estes

_____

HOLLY E. ESTES

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